

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

ADVANCED FIRE TECHNOLOGY, LLC
Employer

and

Cases GR-7- RC-22462

ROAD SPRINKLER FITTERS UA LOCAL NO. 669,
a/w UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPE FITTING INDUSTRY OF THE UNITED STATES
AND CANADA, AFL-CIO
Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

Upon a petition filed on May 2, 2003, a Stipulated Election Agreement approved on May 15, 2003, and a Stipulation To Set Aside Election and Agreement to Conduct a Rerun Election approved on September 24, 2003, a rerun election was conducted in this matter on November 7, 2003, among the employees of the Employer in the following appropriate unit:

All full-time and regular part-time employees engaged in the installation, maintenance, and/or repair of automatic fire protection systems; but excluding all office clerical employees, designers, delivery personnel, casual employees, and guards, professional employees and supervisors as defined in the Act.

At the conclusion of the election, the ballots were counted and the Tally of Ballots showed that two challenged ballots were sufficient in number to affect the ultimate election results.

On February 27, 2004, the parties executed, and the Regional Director approved, a Stipulation Resolving Determinative Challenged Ballots, Revised Tally of Ballots, and Order Approving Stipulation. Pursuant to the terms of that Stipulation, the two challenges were sustained, and the following Revised Tally of Ballots was issued and served on the parties:

Approximate number of eligible voters	7
Number of void ballots	0
Number of votes cast for Petitioner	2
Number of votes cast against participating labor organization	3
Valid votes counted.....	5

Number of unresolved challenged ballots	0
Number of valid votes counted plus challenged ballots.....	5
Number of sustained challenges	2

Thereafter, pursuant to objections to conduct affecting the results of the rerun election timely filed by the Petitioner on November 14, 2003, and served on all parties, a Report on Objections issued on February 27, 2004, which was amended on March 15, 2004. The objections were consolidated for hearing with the unfair labor practice proceeding in Case GR-7-CA-46847 involving the same parties. On March 19, 2004, the Regional Director severed the instant case from GR-7-CA-46847, and postponed the objections hearing without date.

With respect to Case GR-7-CA-46847, Respondent withdrew its answer to the complaint; Counsel for General Counsel filed an unopposed Motion For Default Judgment; and the Board issued an order granting the motion on April 30, 2004. *Advanced Fire Technology, LLC.*, 341 NLRB No. 112 (2004).

With respect to the instant representation proceeding, the Employer claimed it was closing its business. To allow careful consideration of that question and whether it would effectuate the purposes of the Act to process the petition under the claimed circumstances, the Regional Director on March 31, 2004, issued an Order To Show Cause, directing the parties to adduce evidence in affidavit and documentary form as to whether the Employer's business was facing definite and imminent closure. The Order stated that failure to adduce any evidence, or submission of evidence inadequate to establish the Employer's definite and imminent closure, would result in continued processing of the petition, including the rescheduling of the objections hearing. Neither party submitted evidence in affidavit form, and the Employer failed to adduce sufficient evidence to permit a finding at that point that continued processing of the petition would not effectuate the policies of the Act. Accordingly, on May 17, 2004, the Regional Director issued a Report on Objections and Notice of Hearing scheduling a hearing for June 1, 2004.

On May 26, 2004, the Regional Director received from a third-party bank information¹ that the Employer had ceased all operations on May 25, 2004. This third-party also stated that the Employer was liquidating all its assets, including Employer vehicles and real estate. Based upon this evidence, an Order to Show Cause issued requiring the parties to adduce evidence in affidavit and documentary form why the continued processing of this charge should be continued. The Petitioner presented affidavit evidence from which it could be concluded that the Employer may still be in business.

¹ This information, in the form of a letter, was not introduced into the record and therefore it was not considered. Additionally, there was no one at the hearing to authenticate the letter and I would have rejected it on the basis of it being hearsay.

Based upon an investigation of the objections, which was conducted under the direction and supervision of the Regional Director, and after due consideration of the evidence gathered in the investigation, including evidence of other conduct not specifically alleged by the objections that was brought to the attention of the Regional Director during the investigation of Case GR-7-CA-46847, and that may have affected the outcome of the election, the Regional Director concluded that there were substantial and material issues of fact, including credibility resolutions, which could best be resolved by a hearing.

The issues to be litigated at the hearing were as follows:

1. Whether the Employer faces imminent and definite closure, and/or has permanently closed.
2. Petitioner's objections.
 - A. During the critical period prior to the date of the second election, Advanced Fire Technology and/or its president John Phillips, promised to loan and/or actually loaned money to an employee in order for the employee to purchase a vehicle.
 - B. During the critical period prior to the date of the second election, Advanced Fire Technology and/or its president John Phillips, promised to loan money to a second employee in order for the employee to purchase a vehicle.
3. Additional objectionable conduct.²
 - A. Whether the Employer, through its agent and president John Phillips, at its Kalamazoo, Michigan, facility, about October 22, 2003, promised employees a greater voice in managing the business in order to discourage support for the Petitioner.
 - B. Whether the Employer, through its agent and president John Phillips, at its Kalamazoo, Michigan, facility, between October 22 and November 7, 2003, promised employees improved wages and benefits in order to discourage support for the Petitioner.
 - C. Whether the Employer, through an agent, at its Kalamazoo, Michigan, facility, about November 7, 2003, told employees that they were expected to vote against the Petitioner.

² The Board stated in *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138 (1988), "a 'meritorious objection' is anything that would justify setting aside the election, whether that misconduct was raised by the union in its objections or was discovered subsequently by the Agency's own procedures."

On June 23, 2004, the Regional Director issued a Report on Objections and Notice of Hearing. The Regional Director further ordered that the Hearing Officer prepare and serve on the parties a report containing resolution of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of the objections.

I conducted a hearing in this matter on July 1, 2004, at Grand Rapids, Michigan, during which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to produce all relevant evidence bearing on the objections. After careful consideration of the entire record I make the following credibility resolutions, findings of fact, and recommendations to the Board.³

The Hearing

As duly noted on the record, the Employer failed to appear or enter any appearance at the hearing. The Employer was properly served with the Report on Objections and Notice of Hearing by the Regional Director. Board Exhibit 1 contains an Affidavit of Service as well as proof of mailing and the signed return receipt for the Report on Objections and Notice of Hearing that was sent to the Employer.

As a result of the Employer's failure to appear at the hearing, there is no testimony in contradiction to the witnesses called by the Petitioner.

The Employer's Operational Status

The Employer is a construction contractor engaged in the installation, maintenance, and repair of fire protection systems. John Phillips is the president and supervisor of the Employer.

The Petitioner subpoenaed Shirley Larson, the Accounts Receivable supervisor for Etna Supply Company to testify. Etna Supply Company is engaged in the sale of plumbing supplies and fixtures. Larson testified that the Employer is a customer of Etna Supply Company. Larson produced ten invoices⁴ that named the Employer as the purchaser of various plumbing supplies and fixtures used in the fire protection industry dated beyond May 25,

³ The factual findings herein are based on the record as a whole, including the undersigned's observation of witnesses and examination of exhibits received into evidence. All testimony has been reviewed and evaluated in light of the demeanor of witnesses, the logical probability of testimony and the record as a whole. Where any single witness has testified in contradiction to the findings contained herein, their testimony has been discredited as being either in or of itself not worthy of credence or because it conflicted with the weight of other credible evidence. *Bishop and Malco d/b/a Walkers*, 159 NLRB 1159 (1966).

⁴ Petitioner's Exhibit 9.

2004.⁵ Further, Larson testified that an order was scheduled to be delivered to the Employer on the day of the hearing.

The Petitioner called Robert Anderson, an organizer for the Petitioner with 40 years of experience in the installation of fire protection systems. Anderson testified that on multiple dates after May 25, 2004, he witnessed and/or photographed John Phillips, Murray Davis and Frank Campbell at various jobsites engaging in what he considered to be fire protection work. The Petitioner also called employees Scott Stanfill, the Petitioner's election observer, and Lavern Fisk who both testified that they had worked with Murray Davis while employed at the Employer.

The evidence presented by the Petitioner is sufficient to contradict the Employer's assertion that it faces imminent and definite closure, and/or has permanently closed. In crediting the Petitioner's witnesses, the evidence shows the Employer is continuing to order and receive product as well as having employees working on various job sites beyond the date the Employer claims to have closed. See *Fish Engineering & Construction*, 308 NLRB 836 (1992); and *Davey McKee Corp.*, 308 NLRB 839 (1992).

Based on the foregoing, I recommend that the Board reject the Employer's assertion it that faces imminent and definite closure, and/or has permanently closed and order that it would serve a useful purpose to conduct an immediate election should the Board sustain the Petitioner's objections.

The Petitioner's Objections

The Petitioner called Stanfill to testify regarding their objections. Stanfill was an apprentice sprinkler fitter through various dates, including June 7, 2003 to January 16, 2004, for the Employer.

Stanfill testified that Phillips did not actually loan him money to purchase a car. He testified that Phillips led him to believe that after everything was said and done he [Phillips] could help him more. Stanfill explained that he was having car trouble and that he asked Phillips to pay him some money that Stanfill felt he was owed from working on a previous prevailing wage job for which he had made a backpay claim. Stanfill testified that Phillips did not loan him any money. He also testified that he never told anyone that Phillips had loaned him any money to buy a car.

Stanfill then testified that he did ask Phillips to loan him money or to give him the money he was owed and that they could write an agreement to take that off whatever back wages he was owed. Stanfill testified that Phillips said he couldn't help him until everything was said and done. Stanfill also testified that Phillips said that he didn't want any problems going on and that he didn't want it

⁵ Board Exhibit 1.

to look like a bribe, that he couldn't help Stanfill right now, but afterwards he could help him more. Stanfill testified that Phillips didn't say it made a difference whether the Petitioner won or lost as to whether he could help Stanfill.

The Petitioner did not present any evidence that the Employer ever promised to loan money to a second employee in order to purchase a vehicle.

The only evidence presented relating to the Petitioner's objections, goes to the Employer's alleged promise of benefit, the loaning of money to Stanfill. Stanfill's testimony in this regard is inconsistent. First, he testified that he did not ask Phillips to loan him money, then he testified that he either asked for a loan or for the money to be advanced against what the Employer allegedly owed him as part of his prevailing wage claim. The record before me fails to establish that Stanfill is due any money as part of a prevailing wage claim as no determination has been made regarding said claim.

There is no evidence that the Employer ever granted this alleged benefit, or that the Employer ever told Stanfill that such a benefit would be granted. Rather, the evidence, at best, shows an implied promise of a benefit once the election was over. There is no evidence that the Employer ever conditioned the benefit on Stanfill voting against the Petitioner or that the offer of the benefit was conditioned on the Petitioner losing the election. There is no evidence in the record as to the value of the promised benefit. There is no evidence that such an offer of benefit was ever made to any other employees, and Stanfill testified that he did not tell any other employees of the Employer's offer of benefit. There is no evidence establishing the timing of the offer of benefit in relation to the election.

While the offer of benefit did come from the president of the Employer and the election was decided by one vote, there is no evidence that the offer of benefit would have any effect on any other employee than Stanfill. An offer to loan money is a "benefit" that would have to be repaid.

Considering all of the above factors, I conclude that the Petitioner has failed to meet its burden, *Consumers Energy Company*, 337 NLRB 752 (2002), in establishing that the offer to loan Stanfill money is an objectionable promise of benefit. *B & D Plastics*, 302 NLRB 245 (1991).

Accordingly, I recommend that both of the Petitioner's objections be overruled in their entirety.

Additional Objectionable Conduct

The Petitioner called Stanfill to testify as to the circumstances surrounding Phillips' statements in *Advanced Fire Technology, LLC.*, supra. Stanfill's

testimony was limited to show how Phillips' statements constituted objectionable conduct.

Stanfill testified that he was present along with employees Davis and Sam Garcia when Phillips promised employees a greater voice in managing the business. He also testified that he and Davis were present when Phillips promised employees improved wages and benefits. Finally, Stanfill testified that he was present when he was told that he was expected to vote against the Petitioner. Stanfill testified that he did not know if any other employees were told this.

Stanfill's recollection of the dates and locations of when these statements were made was initially confusing when compared to the complaint in Case GR-7-CA-46847. He recalled the first two statements to be the day prior [than the date stated in the complaint] and location, in one instance, to be at a park rather than in the Employer's shop. Nonetheless, I credit his testimony and no witnesses rebutted his testimony. Stanfill impressed me as being forthright and genuinely tried to recall the dates and locations when pressed by counsel. I do not find his difficulty in recalling the exact date or locations where the first two statements were made to be material to the underlying facts of the matter. Stanfill's testimony goes to the objectionable nature of the Phillips' statements.

There are two methods of examining Phillips' statements. First, Phillips' statements are also the subject of the Board's order in *Advance Fire Technology*, supra. Although the Board's order was through a Default Judgment, due to the Employer's withdrawal of its answer, it is nonetheless a determination that the allegations in the complaint are true and therefore are 8(a)(1) violations. Additionally, Phillips' statements can be examined under the traditional *General Shoe* doctrine. *General Shoe Corp.*, 77 NLRB 124 (1948).

Examining Phillips' statements as 8(a)(1) conduct, it is well settled that conduct in violation of Section 8(a)(1) that occurs during the critical period prior to an election is "a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). The Board has recognized a narrow exception to this rule for conduct that is so minimal or isolated that "it is virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). See *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001).

In examining Phillips' statements, and their potential effect on the laboratory conditions⁶, I have considered that Phillips, the president of the Employer, made the statements to the employees. Promises of improved wages and benefits are not taken lightly and given, Phillips' involvement, they are not likely to be forgotten. *Michael's Painting, Inc.*, 337 NLRB 860 (2002). The bargaining unit consists of seven employees, of which only five voted. The

⁶ *Vestal Nursing Center*, 328 NLRB 87 (1999).

Petitioner presented evidence that Phillips' statements were made in front of one bargaining unit employee with one or two additional bargaining unit employees present. Finally, the election was decided by one vote. *Archer Services*, 298 NLRB 312 (1990).

Considering all of the above, Phillips' statements do not fall within the narrow exception to be so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results. *Clark Equipment*, supra.

Additionally, standing on its own, it is well settled that promises of improved wages and benefits made during the critical period will warrant setting aside an election. *Wal-Mart Stores*, 325 NLRB 124 (1997); *Beverly Enterprises, Inc.*, 322 NLRB 334 (1996).

Finally, I have also considered Phillips' statements under *General Shoe*, supra, and the factors set forth in *Harsco Corp.*, 336 NLRB 157 (2001). Phillips, the owner of the company, made three statements to employees, during the critical period that were promises of improved wages and benefits, having a greater voice in managing the business and telling employees they were expected to vote against the Petitioner. Three out of the seven eligible employees were present during some of Phillips' statements and the election was decided by one vote.

Accordingly, considering all of the factors above, I recommend that the election be set aside based on Phillips' statements, and that a new election be conducted.

Conclusions and Recommendations to the Board

Based on my findings and conclusions set forth above, I recommend that the Board reject the Employer's assertion that it faces imminent and definite closure, and/or has permanently closed, overrule the Petitioner's objections and set aside the election based upon Phillips' statements, and that it order a new election to be conducted.⁷

Dated at Grand Rapids, Michigan, this 17th day of August 2004.

Ethan N. Ray, Hearing Officer
National Labor Relations Board
Region Seven
Grand Rapids Resident Office
82 Ionia N.W., Room 330
Grand Rapids, MI 49503-3022

⁷ Under the provisions of Section 102.69 of the Board's Rules and Regulation, Series 8, as amended, by **August 31, 2004**, either party may file with the Board in Washington, D.C., an original and seven copies of exceptions thereto. Immediately upon filing of such exceptions the party filing same shall serve a copy thereof on the other parties and on the Regional Director. If no exceptions are filed, the Board may adopt the recommendations of the Hearing Officer.